IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 615

RALPH BERGER,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF DEFENSE LAWYERS IN CRIMINAL CASES, AMICUS CURIAE

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Interest of Amicus Curiae

The National Association of Defense Lawyers in Criminal Cases is an organization devoted to the improvement of the administration of the criminal law, and with the consent of the parties, files this brief urging reversal of the judgment below, because of its belief that the administration of criminal law can be no better than due process inviolate. The Association has no concern for the particular defendant involved, but regards itself as counsel for principle.

Statement of Issue

Petitioner was convicted of conspiracy to bribe a public official. It has been stipulated that without the leads and evidence obtained through "room" or "bug" type electronic

eavesdropping apparatus, petitioner could not have been indicted, prosecuted or convicted. The eavesdropping occurred inside two private offices, one of which was a law office, and was effected by installing concealed microphones in the respective rooms, necessitating thereby, physical intrusions by the police upon the premises.

The eavesdropping was executed pursuant to a court order secured *ex parte* authorizing the procedure. New York permits a court to issue such an order when it is satisfied that "there is a reasonable ground to believe that evidence of crime may be thus obtained." (New York Code of Criminal Procedure § 813-a). The issue for decision is whether the procedure employed in this case by New York and the authorizing statute behind it, are in harmony with the requirements of the Constitution of the United States.

Statute Involved

Section 813-a of the *New York Code of Criminal Procedure* is captioned, "Ex parte order for eavesdropping", and provides:

> An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, iden-

tifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

Summary of Argument

Eavesdropping, accompanied by a trespass upon a constitutionally protected area is prohibited by the Constitution of the United States. *U.S.C.A. Const. Amend. 4; Silverman* v. *United States*, 365 U.S. 505 (1961). New York through statutory authorization (N.Y. Code Crim. Proc. § 813-a), attempts to immunize itself against this mandate of the Federal Constitution by equating its statute with the Warrant Clause of the Fourth Amendment. The Constitution and our concern for a free society are united in opposing such a purported equation.

ARGUMENT

POINT ONE

Inability of eavesdrop order to specify things or conversations to be seized.

The most obvious deficiency in attempting to equate the eavesdrop order with the Warrant Clause of the Fourth Amendment is the total inability of such an order to specify the object to be seized. This crucial omission of necessity brings the court approved eavesdrop within the prohibited general warrant area. Such a procedure runs directly contrary to the clear requirement for particularity of warrants prescribed by this Court in *Marron* v. *United States,* 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Interestingly enough, one of the considerations leading to the Court's opinion in *Olmstead* v. *United States,* 277 U.S. 438, 464 (1928), seemed to be the very inability of the warrant to specify the object of seizure. Thus the Court emphasized the Fourth Amendment's reference to "things":

> The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.
>
> (emphasis as in original.)

By its very nature, electronic eavesdropping cannot satisfy the vital requirement for specificity necessary for

the issuance of search warrants. Electronic eavesdropping is indiscriminate and records all conversation, thereby laying bare the totality of citizens' thoughts and words, and capturing all communicative intercourse—privileged and non-privileged alike. No conceivable warrant could authorize such an electronic "search" while conforming to the description requisite of the Constitution. This difficulty does not validate or create an exception to the Amendment's standards.

POINT TWO

Eavesdrop order as constituting a search for mere evidence.

The New York statute in question authorizes a court to issue an order for eavesdropping, when the court is satisfied that "there is reasonable ground to believe that evidence of crime may be thus obtained." Such a concept constitutes an unwarranted extension of our traditional views that search warrants may issue only to seize contraband, fruits of crime, and instrumentalities employed in the commission of crime. *Harris* v. *United States,* 331 U.S. 145 (1947).

This Court's classic opinion in *Boyd* v. *United States,* 116 U.S. 616 (1886), prohibits the seizure of mere evidence, and carefully defines the interrelationship of the Fourth and Fifth Amendments. Since *Boyd, supra,* this Court has considered several cases dealing with the problem: *Gouled* v. *United States,* 255 U.S. 298 (1921); *Marron* v. *United States, supra; United States* v. *Lefkowitz,* 285 U.S. 452 (1932); *Davis* v. *United States,* 328 U.S. 582 (1946); *Zap* v. *United States,* 328 U.S. 624 (1946); *Harris* v. *United States, supra,* and *Abel* v. *United States,* 362 U.S. 217 (1960). While these cases do contain their individual nuances distinguishing them from *Boyd,* the central holding of Boyd, that a search for mere evidence is impermissible, has never been repudiated by this Court.

The issue of searches for mere evidence has recently been considered by several state courts. *State* v. *Bisaccia,* 45 N.J. 504 (Supreme Court of New Jersey, 1965); *People* v. *Thayer,* 47 Cal. Reptr. 780 (Supreme Court of California, 1965); *People* v. *Grossman,* 45 Misc. 2d 557 (Supreme Court of New York, Kings County, 1965) reversed at 27 A. D. 2d 572 (Appellate Division, Second Department, 1966). Although these courts examined the problem in different contexts and arrived at dissimilar conclusions, the direct issue in point was the matter of searches for mere evidence; from the comprehensive and considered opinions of these courts, some light may be shed on the question before this Court.

People v. *Grossman, supra,* involves a case where there was court sanctioned eavesdropping pursuant to the identical statute present in the case at bar. In an exhaustive and carefully documented opinion, Mr. Justice Nathan R. Sobel concluded that a "search and seizure of tangibles which are mere evidence and a search and seizure of intangibles in the nature of conversations or verbal statements would violate the Fourth and Fifth Amendments" (*supra* at 574). And, of course, the violation of Fourth and Fifth Amendment guarantees, carries with it the concomitant violation of minimum due process of law standards imposed upon the States by the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Ker* v. *California,* 374 U.S. 23 (1963); *Malloy* v. *Hogan,* 378 U.S. 1 (1964). The core of Mr. Justice Sobel's opinion is to be found in his recital of *Boyd, supra*:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give *evidence* against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness

> against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. *And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself * * * and we are further of opinion that a compulsory production of the private books and papers * * * is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment* (pp. 633, 634-635; italics added.)
>
> (emphasis as in opinion at p. 572.)

Then, taking into account this Court's holding in *Wong Sun* v. *United States,* 371 U.S. 471, Justice Sobel postulates:

> If we substitute in the underscored portion above the word 'conversations' for 'private papers' we understand better the nature of the holding in Boyd.
>
> (*supra,* at 572).

In *People* v. *Thayer, supra,* the objects of the evidentiary search were various records of defendants. The Court there held that the federal rule against searches for mere evidence [*Gouled* v. *United States, supra; Federal Rules of Criminal Procedure,* Rule 41(b)] was not of constitutional dimension, and declined to suppress the seized evidence. In passing, Mr. Chief Justice Traynor writing for the Court observed that this Court "has refused without explanation to apply it [mere evidence rule] to evidence other than tangible objects, such as that obtained by electronic devices designed to intercept conversations, although no policy reason for the distinction suggests itself. (*On Lee* v. *United States* (1952) 343 U.S. 747, 753, 72 S. Ct. 967, 96 L. Ed. 1270.)" (*supra* at 783).

To be sure, no policy reason for the distinction suggests itself, and for that reason and in order to bring consistency to this branch of the law, *On Lee, supra,* and its progenitor *Olmstead* v. *United States, supra,* should be overruled. For in both *On Lee* (at p. 753) and *Olmstead* (at p. 464), the Court expressly stated that the Fourth Amendment was concerned only with the unlawful seizure of tangible property; *Silverman* v. *United States, supra* and *Wong Sun* v. *United States, supra,* now bring verbal statements within the protection of the Fourth Amendment.

State v. *Bisaccia, supra,* attempts to strike a middle ground between the two absolutist positions of the preceding two cases. The search and seizure of evidence here, concerned a pair of shoes which matched a culprit's footprint. After separating and divorcing the Fourth and Fifth Amendments from each other, the Court reached the conclusion that it was constitutionally permissible to search for evidence of tangibles other than private papers. Mr. Chief Justice Weintraub speaking for the Court aptly observed:

> There is a marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect. As we have said, private papers are almost inseparable from the privacy and security of the individual. To browse among them in search of anything inculpatory involves an exploratory search indistinguishable from the search under the general warrant which the Fourth Amendment intended to outlaw.
>
> (*supra,* at 515).

Again, if we substitute the word "conversations" for "private papers" we can better appreciate the protection afforded by the Fourth Amendment.

Although the solution found in *Bisaccia* has merit in being able to comply with the particularity of warrants requirement, its lack of comprehension of the interplay be-

tween the Fourth and Fifth Amendments requires our disapproval. Only a treatment of the mere evidence rule which takes into consideration the respective interests of the Fourth and Fifth Amendments should be sanctioned.

POINT THREE

The New York Statute is contrary to the policy underlying the Bill of Rights.

The individual, sporadic eavesdropper breaches the right of privacy; a systemitized, directed program of eavesdropping does more—it constitutes an illegal search, albeit a search for words. This manner of search violates the Fourth Amendment in two ways. It offends the Privacy Clause, in that it constitutes an unreasonable intrusion upon personal security and violates the Warrant Clause, because it cannot satisfy its stringent requirements.

It is well to note here, that our primary concern in the present case is with electronic eavesdropping. This brief does not reach the problem of the utilization of electronic apparatus for other purposes. *Lopez* v. *United States,* 373 U.S. 427 (1963) and *Osborn* v. *United States,* 385 U.S. 323 (1966), pertain to electronic recording and buttressing of trial testimony (cf. *On Lee* v. *United States, supra*) and do not involve the problems of omnipresent surreptitious eavesdropping or general search which are of singular interest here.

In addition to violating the Fourth Amendment, electronic searches for verbal evidence, do violence to the privileges guaranteed by the Fifth Amendment. The interdependence of the Fourth and Fifth Amendments were clearly enunciated by Mr. Justice Brandeis in his eloquent and monumental dissenting opinion in *Olmstead* v. *United States, supra,* at 478:

> The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Many of the forecasts for the development of scientific eavesdropping expressed by Mr. Justice Brandeis in the *Olmstead* case, have come to pass; modern technology continues to develop new and more efficient methods for spying upon our neighbors. [For a demonstrative report on the practice of eavesdropping, see: Dash, Schwartz and Knowlton *The Eavesdroppers,* Rutgers University Press, 1959]. In seeking responsible governmental ways to cope with this advancing technology, fear should play no part. Mr. Justice Frankfurter aptly described the consequences of a response springing from fear:

> Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecu-

> tion's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it was a hot-water faucet.
>
> (*On Lee* v. *United States, supra,* dissenting opinion at 758.)

As science refines the techniques, there will be an inevitable pressure for new and more extensive "dirty business." It is therefore necessary to overrule *Olmstead* and *On Lee* and bring surreptitious eavesdropping within the Fourth and Fourteenth Amendments to the United States Constitution. The exclusionary rule will discourage disreputable and illegal police practices in electronic surveillance. Such a consequence will:

> * * * give[s] to the individual no more than that which the Constitution guarantees him, and to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.
>
> (*Mapp* v. *Ohio, supra,* at p. 660.)

CONCLUSION

The New York permissive eavesdrop statute is offensive to the Constitution of the United States. Since the judgment below was secured as a result of this unconstitutional conduct, Amicus Curiae urges its reversal.

Respectfully submitted,

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